THE NATIONAL INTEREST
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A Mandate for Israel

September 1, 1993 *Topic:* Security *Regions:* Levant, Middle East *Tags:* Cold War, Gulf War, Zionism

Mini Teaser: The ultimate success of the current Arab-Israeli negotiations will hinge on how they deal with the legal and moral essence of the conflict: the longstanding Arab legal and moral arguments used to oppose Zionism and Israel.

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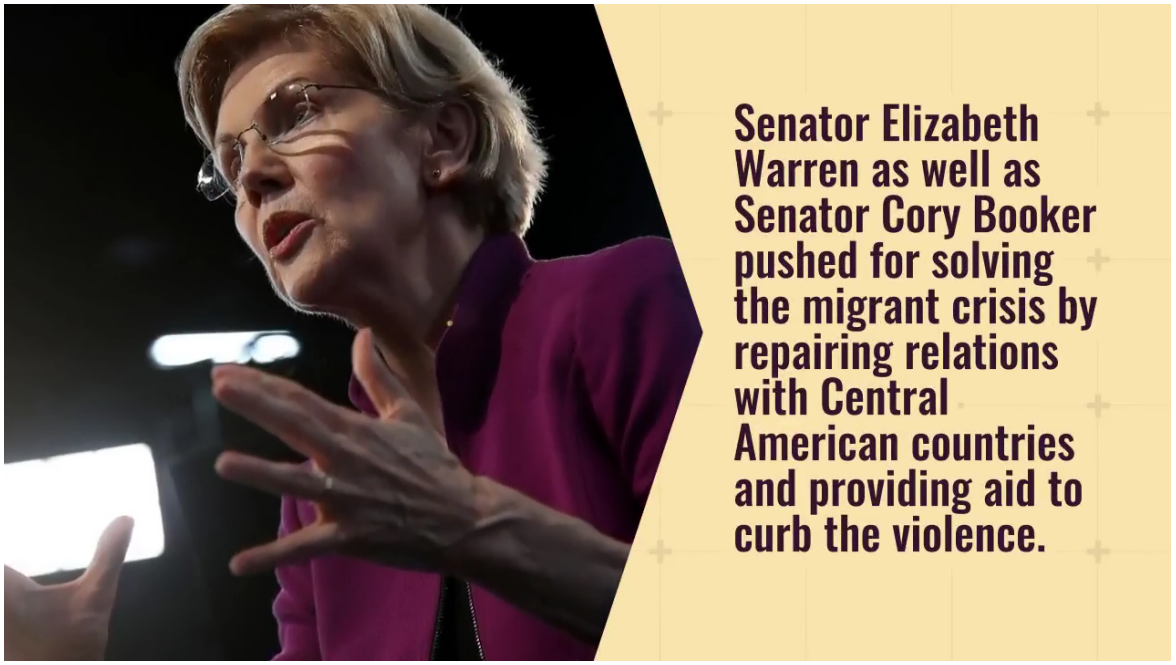

Churchill's inclination to put Eastern Palestine under Arab administration--to lop off around 80 percent of the territory originally available for the Jewish national home--caused consternation among the Jews. It moved Chaim Weizmann to write

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Churchill that a Jewish national home confined to Western Palestine was altogether inadequate:

"The economic progress of Cis-Jordania [that is, Western Palestine] itself is dependent upon the development of these Trans-Jordanian plains, for they form the natural granary of all Palestine and without them Palestine can never become a self-sustaining economic unit and a real National Home.... It is fully realized that His Majesty's Government must consider their pledges to the Arab people and the means of satisfying their legitimate aspirations. But the taking from Palestine of a few thousand square miles, scarcely inhabited and long derelict would be scant satisfaction to Arab Nationalism while it would go far to frustrate the entire policy of His Majesty's Government regarding the Jewish National Home."

Meanwhile, representatives of the leading Arab families of Palestine sent Churchill a memorandum of their own. Though they rejected the notion that the Arabs of Palestine are a nationality different from that of the Arab people in general, they organized themselves politically to fit within the "imperialist" boundaries they hoped to erase. Hence, it was in the name of the Palestinian Arab Congress that they wrote to Churchill declaring the Balfour Declaration invalid, stating that "Palestine belongs legally to the Arabs" and contending not only that the Jews have no rights in the land, but that they have no rights at all as a national group: "[T]hey have no separate political or lingual existence." The Arab leaders creatively used the phenomenon of antisemitism as an argument against Zionism:

"If Russia and Poland, with their spacious countries, were unable to tolerate them, how could Europe expect Palestine to welcome them...[W]ill the Jew, on coming to Palestine, change his skin and lose all those qualities which have hitherto made him an object of dislike to the nations?"

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The memorandum invoked the forged Protocols of the Elders of Zion as evidence of Jewish "pernicious motives." Finally, it denied that Palestine is a distinct national homelandand insisted on independence for a single national entity for the Arabs:

"[T]he Arabs are convinced that this unnatural partitioning of their lands must one daydisappear....Palestine should not be separated from her sister States."

Notwithstanding the pleas of his various correspondents, Churchill met with Abdullah in Jerusalem and, without the participation of the Zionists, the two men struck a deal by which Eastern Palestine was, at least temporarily, closed to Jewish settlement, excluded from the Mandate's Jewish national home provisions, and put under an administration to be headed by Abdullah, subject to supervision by the British High Commissioner for Palestine. Churchill took pains to clarify that his government was "constituting Trans-Jordania an Arab province of Palestine." In return, Abdullah pledged to keep his hands off French Syria and to support the Mandate, which meant suppressing anti-Zionist activity: another land-for-peace deal that failed to produce peace.

The agreement with Abdullah raised legal problems because Trans-Jordan is in Palestine. The Mandate required, in Palestine, the encouragement of "close settlement by Jews" and the establishment of a Jewish national home. Churchill recognized that Trans-Jordan could not legally be transformed into an Arab emirate closed to the Jews unless the Mandate were amended. His staff urged him to finesse the problem by asserting that the necessary authority inhered in the famous Balfour Declaration proviso about protecting the "civil and religious rights" of the non-Jewish communities. But Churchill rejected the ploy and insisted on a formal amendment. Thus, in the Spring of 1921, came into being Article 25 of the Palestine Mandate, which declares:

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"In the territories lying between the Jordan [River] and the eastern boundary of Palestine...the Mandatory shall be entitled, with the consent of the Council of the League of Nations, to postpone or withhold application of such provisions of this mandate as he may consider inapplicable to the existing local conditions ...."

Article 25 emphasizes that the Palestine Mandate extends both west and east of the Jordan River: "in the territories lying between the Jordan and the eastern boundary of Palestine." Its purpose was to allow Britain to "postpone or withhold" the Mandate's Jewish national home provisions with respect to Eastern Palestine. In his autobiography, Sir Alec Kirkbride, a British military officer and diplomat who played a central role in the history of Trans-Jordan, reported sardonically on the creation of Article 25: "In due course the remarkable discovery was made that the clauses of the mandate relating to the establishment of a National Home for the Jews had never been intended to apply to mandated territory east of the river."

In the aftermath of the Great War, in Europe, Asia, Africa, and the Middle East, borders were being drawn or redrawn, states created or dismantled and territories transferred from one state to another--all, naturally, to the advantage of the victorious Allies and their friends and the disadvantage of the defeated powers and theirs. From the victors' viewpoint, the Arab people were set to benefit from the Allied triumph far beyond their contribution to it. As for the Arabs of Palestine in particular, their complaints lacked weight relative to the claims of the Zionists. They rang hollow also in absolute terms, given that the Palestinian Arab community (as opposed to the Hashemite forces) fought against Britain. In his Memoirs of the Peace Conference, Lloyd George commented:

"No race has done better out of the fidelity with which the Allies redeemed their promises to the oppressed races than the Arabs. Owing

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to the tremendous sacrifices of the Allied Nations, and more particularly of Britain and her Empire, the Arabs have already won independence in Iraq, Arabia, Syria, and Trans-Jordania, although most of the Arab races fought [for Turkey]....The Palestinian Arabs fought for Turkish rule."

When, in 1922, the final amended draft of the Palestine Mandate came before the League Council, Balfour said very much the same thing, concluding: "[T]hat we should be charged...with having taken a mean advantage of the course of international negotiations [with the Arabs], seems to me not only unjust to the policy of this country, but almost fantastic in its extravagance." Even before Britain had decided to shrink the Jewish national home, Balfour, speaking of the entire Mandate territory on both sides of the Jordan, expressed the hope that the Arabs "will not grudge that small notch...in what are now Arab territories being given to the [Jewish] people who for all these hundreds of years have been separated from it." Though nearly 80 percent of that "small notch" was soon made off limits to the Jews, the Arab powers continued to "grudge" a Jewish state in Palestine.

The League Council confirmed the Mandate in July 1922. It then approved a British resolution that listed all the mandate provisions mentioning Jews and the Jewish national home and declared them "not applicable to the territory known as Trans-Jordan." The resolution stated that the administration of Trans-Jordan would be under the general supervision of the Palestine Mandatory. From this point forward, British officials sharpened the distinction between their separate administrations in Western Palestine and Trans-Jordan (both under the Palestine Mandate) by referring to the latter only as Trans-Jordan, not as Eastern Palestine. It became the practice to refer to Western Palestine simply as Palestine. Trans-Jordan remained under the Palestine Mandate until 1946, when, as noted, it achieved independence. As a matter of geographical fact, it has never ceased to

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be Eastern Palestine. In 1949, after Trans-Jordan conquered the territory it dubbed "the West Bank," the country changed its name to Jordan. It is now governed by King Hussein, grandson of the Emir (later King) Abdullah.

Law, History, and Current Diplomacy

American policymakers show a powerful disinclination to enter into the kind of legal and historical issues raised here. They dismiss them as academic--disconnected from the practical realities of war and diplomacy. Yet these same policymakers attribute enormous value to negotiations and peace agreements. The inconsistency can be dangerous.

One can say that international law is cant, lacking real world significance. History does offer some support for that proposition. But one can hardly then contend that peace agreements are important. They are, after all, but a sub-species of international law. To devalue international law--to treat it non-rigorously or not at all, to reject the relevance of old laws, mandates, agreements, and the like--is to foreshadow the lack of respect that will be shown to the treaties now under negotiation, if they materialize at all.

The fact is that international law, including arms control agreements and peace treaties, has often proven impotent. Violators have often escaped not only sanctions, but even criticism. Solemn pledges to guarantee treaty compliance have been shirked on numerous occasions. Political leaders around the world show much greater interest in the conclusion of new treaties than in compliance with those already on the books. Perhaps this reflects the immutable nature of international affairs. In that case, however, it cannot be assumed, for example, that an effort by Syria's President Assad to recover militarily valuable territory from Israel in return for a peace treaty necessarily has anything to do with true peace.

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International law, of which the Mandate is a part, specifically validates Jewish claims in Palestine and recognizes those claims as arising from "the historical connection of the Jewish people with Palestine." Arab opponents of Zionism have, from the beginning, opposed this view.

The legal case against Israel's legitimacy is built on two major arguments. The first is that Arab "natural rights," rooted in the Arabs' majority status in the land in recent centuries, superseded any Jewish historical rights and precluded Britain, the League of Nations, or anyone else from lawfully establishing a Jewish state (or "national home") on this "Arab" land. This natural rights concept is promoted nowadays at the United Nations by means of resolutions that refer pointedly to the West Bank and Gaza Strip as "occupied Arab territories" instead of simply "occupied territories."

The issue of whether history or nature provides the Jews or the Arabs the better case for controlling Palestine raises fascinating metaphysical questions. As a matter of law, however, it was mooted by the fact that the international community, acting through the League, legislated in the Mandate in favor of a Jewish national home in Palestine. The international community, furthermore, has, in a series of UN Security Council resolutions over decades, consistently reaffirmed Israel's rights as a sovereign state and the general obligation to respect those rights and live with the Jewish State peaceably and without threats. The Arab natural rights argument says that the Palestine Mandate was unfair, impolitic, and impractical. It asserts, in effect, that the Allies legislated unwisely on Palestine. But even if that were true, it would not mean that the Allies had no legal right to legislate as they did.

It bears reiterating that traditional international law would have supported Palestine's annexation by the powers that conquered it from

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the Ottomans. The Great War Allies, however, chose to eschew rights of subjugation and annexation. One can contend that the Allies or the League made a bad decision in creating the Palestine Mandate. And one can regret that traditional international law gave victors rights over conquered territories. But one cannot accurately say that the Allies and the League violated international law by acting to dispose of Palestine (in Balfour's words) "in the interests of what they conceived to be the general welfare of mankind."

Unlike the natural rights argument, the second major Arab argument against Israel's legal validity is made from within the established framework of international law. It posits that the Mandate violated the League of Nations Covenant because the Jewish national home policy was inconsistent with Article 22 of the Covenant and especially with the principle of self-determination as enunciated in that article. Article 22 states, however, that each mandate "must differ" according to the circumstances of the beneficiary people and that the terms of certain mandates may be defined on a case-by-case basis. The promulgators of Article 22 applied these provisions to Palestine by effectively designating the Jewish people as a whole as a principal beneficiary of the trust and focusing that mandate on the establishment of a Jewish national home. The same powers that drew up Article 22 drew up the Palestine Mandate, the general outlines of which were developed before Article 22. The Balfour Declaration, after all, antedated the League Covenant. Given the sequence of events, it is not credible to argue that the Mandate's drafters unlawfully transgressed the concepts, plans, and flexible authority that these very same parties built into Article 22 a few months before.

The United Nations Special Committee on Palestine (UNSCOP), created in 1947 to propose a solution to the Palestine problem, addressed the Arabs' self-determination argument. It highlighted that

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self-determination, though a principle of international law, is not necessarily a right:

"With regard to the principle of self-determination, although international recognition was extended to this principle at the end of the First World War and it was adhered to with regard to the other Arab territories [i.e., Syria and Mesopotamia], at the time of the creation of the [Middle Eastern] Mandates, it was not applied to Palestine, obviously because of the intention to make possible the creation of the Jewish National Home there...

There would seem to be no grounds for questioning the validity of the Mandate for the reason advanced by the Arab States. The terms of the Mandate for Palestine, formulated by the Supreme Council of the Principal Allied Powers as a part of the settlement of the First World War, were subsequently approved and confirmed by the Council of the League of Nations."

The Mandate secured Jewish rights to a homeland and to "close settlement" in Palestine. In doing so, it distinguished between Eastern and Western Palestine, but it did not distinguish between the region of Judea and Samaria and the rest of Western Palestine. No event and no armistice or other international agreement has terminated the Mandate-recognized rights of the Jewish people, including settlement rights, in those portions of the Mandate territory that have not yet come under the sovereignty of any state.

Those rights did not expire upon the demise of the League of Nations, the creation of the United Nations, or the UN General Assembly's adoption of the 1947 UNSCOP partition plan for Western Palestine. Article 80 of the UN Charter expressly preserves such "rights of peoples" as existed under League mandates. UN General Assembly Resolution 181 of November 1947, which endorsed the UNSCOP plan, never won the Security Council endorsement necessary to render it a legally

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binding action. Nor was the plan ever implemented. The position of the U.S. State Department on the legal status of Resolution 181 appears in a Near East Bureau memorandum dated January 27, 1948: "The growing tendency to refer to the recommendation of the General Assembly as a decision which must be carried out must not be allowed to divert our attention from the fact that the action of the General Assembly was only a recommendation"[emphasis in original]. Never having achieved the status of law or even a reality on the ground, Resolution 181 cannot be deemed to have invalidated legal rights expressly recognized in the Palestine Mandate.

The acquisition of duly recognized sovereignty over Judea and Samaria by Jordan or Israel could perhaps have superseded any prior collective rights, including the right of the Jewish people to "close settlement" there. Since May 1948, however, neither the United States nor the international community has recognized any state as sovereign in Judea and Samaria. Each of the armistice agreements Israel signed with its neighbors in 1949 provided (at the insistence of the Arab parties) that neither party renounces any rights it may have regarding territories on the other side of the armistice lines. The agreement between Israel and Jordan, for example, states that the armistice lines "are agreed upon by the Parties without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto." Furthermore, in 1988, the Kingdom of Jordan officially severed its legal and administrative ties to Judea and Samaria.

Eugene V. Rostow, who as undersecretary of state during the Johnson administration helped draft UN Security Council Resolution 242, has written that Judea, Samaria and the Gaza Strip constitute portions of the Palestine Mandate trust territory that have not yet been allocated to a sovereign. Rostow, a former dean of Yale Law School, concludes that the Mandate remains in force for those regions, just as the

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corpus of an ordinary trust remains trust property until it is lawfully disbursed or allocated, notwithstanding the trustee's death, resignation or removal. It is not necessary, however, to decide whether the Mandate and all its institutions remain in full effect for these territories in order to conclude that, since Britain's resignation as Mandatory, no event has legally terminated or superseded the right of Jews to settle there, as derived from the "historical connection of the Jewish people with Palestine" recognized in the Mandate.

Contrary to the refrain of various United Nations resolutions, the 1949 Fourth Geneva Convention does not render Jewish settlement in these territories unlawful. First of all, the Convention, by its own terms, may not apply at all to Judea, Samaria, and the Gaza Strip, for that land is not (and since 1949 has never been) "the territory of a High Contracting Party" within the meaning of Article 2, which delimits the Convention's applicability. Egypt administered the Gaza Strip as occupied territory, under a military governor, from 1948 forward and never annexed or incorporated it into the Egyptian state. And, as noted, Jordan's purported annexation of Judea and Samaria, effectively renounced by Jordan itself in 1988, did not win international recognition. It can also be argued that Article 49 of the Convention, which provides that an occupying power "shall not deport or transfer parts of its own civilian population into the territory it occupies," is not applicable to the case at hand. The Convention's official Commentary makes clear that Article 49 was drafted with reference to the massive, forcible population transfers effected by Nazi Germany during World War II. Some legal authorities have concluded that it does not apply to Israeli settlement activity in the territories, which is voluntary and has entailed no substantial displacement of the local Arab population.

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Even if one assumes Article 49's applicability to Israel's authority as military occupant, however, the Jewish people do not thereby lose their Mandate-recognized rights in Judea, Samaria, and the Gaza Strip. If the Fourth Geneva Convention applies, Israel is constrained solely in its capacity as an occupying power. The Convention does not address or affect the rights or authority of the Jewish people in their capacity as beneficiaries of the Mandate. In other words, Jewish rights there do not derive from Israel's capture of the territories in 1967. So any limitations imposed by the laws of war on Israel with respect to the military occupation of the territories cannot negate those independent, pre-existing rights.

Five months after the Arab-Israeli "six day war" of June 1967, the UN Security Council adopted Resolution 242, which states general principles on which "a just and lasting peace in the Middle East" should be established. Though frequently misread as requiring Israel's relinquishment of all the land lost by Arab states in the 1967 war, it in fact leaves the issue of territorial rights open for resolution by agreement among the parties. It does not call for anyone's relinquishment of any territorial rights before the conclusion of peace. Moreover, by stressing the importance of security, highlighting the right of all states to live "within secure and recognized boundaries" and refraining from calling for withdrawal from all the newly acquired territories, Resolution 242 envisions that peace talks will produce borders different from the 1949 armistice lines. If the Security Council had intended that Israel withdraw its forces to a definite line, it could have said so. Thus, pending the peace contemplated in Resolution 242, the Jewish people retain whatever rights of "close settlement" or territorial claims belonged to them before the Resolution. And after any such peace, the rights of all parties will be as set forth in the negotiated legal instruments.

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It must be emphasized that the issue of Jewish rights of "close settlement" throughout Western Palestine is a completely different matter from whether Israel should trade those rights for something else, such as a peace treaty. The point here is simply that the argument that the Jews have no legal right to settle in Samaria and Judea tends inevitably, even if unintentionally, to undermine the Jewish people's right to sovereignty in pre-1967 Israel, for all such rights flow from the same source--the Palestine Mandate recognizing the Jewish people's historical connection with Palestine.

The Real Issue

Recognition of Jewish claims does not require denial that the Arabs have claims there too. Even the more militant Zionist leaders, like Vladimir Jabotinsky, acknowledged that the Arabs have claims that must be balanced against those of the Jews. In 1937, as the Nazi campaign against the Jews intensified, Jabotinsky told the Palestine Royal Commission:

"[W]hen we hear the Arab claim confronted with the Jewish claim; I fully understand that any minority would prefer to be a majority, it is quite understandable that the Arabs of Palestine would also prefer Palestine to be the Arab State No. 4, No. 5, or No. 6--that I quite understand; but when the Arab claim is confronted with our Jewish demand to be saved, it is like the claims of appetite versus the claims of starvation. No tribunal has ever had the luck of trying a case where all the justice was on the side of one Party and the other Party had no case whatsoever."

Arab opponents of Zionism have opposed any such balancing of claims. They have rejected Zionism, the Balfour Declaration, the Palestine Mandate, and the State of Israel as a matter of principle, not because they thought the Jews should get a little less land and the Arabs a little more.

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Western statesmen have failed to do justice to the intensity and ideological steadfastness of the anti-Zionist cause when they thought they could buy the Arabs off with territorial concessions that leave a Jewish state in the picture. Recall that Britain's original land-for-peace concept was that the Arab people would get Syria, Lebanon, Iraq and Arabia and the Jews would get Palestine. Then, under the Churchill plan, Arabs received almost 80 percent of Palestine in return for consenting to a Jewish national home in the 20 percent west of the Jordan River. During the 1930s and 1940s, Arab leaders were offered a series of plans for the partition of Western Palestine. They unanimously rejected all of them, even those leaving only a few slivers of land under Jewish control. The Arabs insisted that Palestine belongs to them, Zionism is illegitimate and the issue is one of principle. Western policymakers persisted in assuming that such hostile statements were insincere, a device for obtaining a better deal.

Having for years disbelieved the pledges of eternal hostility to Zionism, many of our policymakers were quick to accept at face value the post-Gulf-War decision of various Arab leaders to negotiate peace. Under the circumstances, a student of history must at least raise the question whether this decision to negotiate represents an actual change of heart or merely a means of retrieving land and gaining advantage for future assaults. History, after all, knows of cases where parties talked peace without intending peace.

Underlying the current negotiations is the notion that the essence of the Arab-Israeli conflict is the amount of territory controlled by the Jewish state. There are better grounds for believing, however, that the conflict's essence, as Arab spokesmen have asserted since World War I, is the issue of legitimacy: Do the Jewish people have a right to a state anywhere in Palestine? If the parties to the current negotiations are divided on this issue, their diplomacy is likely to

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prove as fruitless as most of the Palestine-related diplomacy throughout history. If the Arab parties have truly abandoned the conviction that the Arabs alone have national rights in Palestine, as Anwar Sadat certified for Egypt, then diplomacy may accomplish something constructive.

It came to be conventional wisdom in recent years that the key to resolving the Palestine conflict is satisfaction of the Palestinian Arabs' unfulfilled national aspirations. But there are problems with this view. First of all, the conflict antedates the claim that the Palestinian Arabs are a national group as such. As we saw, the Palestinian Arab leadership expressly disclaimed that status, and did so until quite recently. Secondly, there exists a sovereign Arab state already in Eastern Palestine. Even if one credits the idea that the Arabs of Palestine are a distinct people entitled to self-determination as such, it is a stretch to conclude that the Arabs of Western Palestine are an ethnically, religiously, culturally, or linguistically distinct people entitled, on the principle of self-determination, to their own state.

Perhaps more important, however, are the practical objections to focussing on the purported statelessness of the Palestinian Arabs. Western Palestine is small. The distance from the Sea to the Jordan River is around 45 to 50 miles; from Lebanon to Eilat is less than 300 miles. The practical difficulties of satisfying within this tiny strip of land both the national aspirations of all the Arabs there and Israel's need to safeguard its physical security and national rights have long proven insurmountable. This may be because they are insurmountable.

It is obvious why an antagonist of Israel would want to assert that the Arabs of Palestine are stateless. The effect is to put Israel on the moral defensive and damage its standing. But if one aims to

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promote peace, it is constructive, perhaps indispensable, to acknowledge that there are already two states in Mandate Palestine, one Arab (Jordan) and one Jewish (Israel). Though there does not seem to be enough land in Western Palestine to satisfy the requirements of both the Jews and the Arabs, there should be enough if all of Mandate Palestine is taken into account and if the relevant Arab powers are willing to live with Israel in peace.

True peace will not result automatically from peace treaties. New treaties, if complied with long enough, may help stimulate the rethinking in the Arab world necessary to lay to rest the issue of Israel's legitimacy. That is the essential condition of true peace, the kind that exists without reference to any military balance. In the meantime, however, with or without new treaties, the region's peace will continue to depend on Israel's ability to defeat any military opponents. The value of a new treaty will depend on whether it effectively fosters acceptance of Israel's sovereign rights--helps bring about a pacific change of heart among the traditional opponents of Zionism--and whether it preserves for Israel the military assets that will deter war pending this hoped-for change of heart. If it does, it will deserve the title "peace treaty." If not, it will join the long list of international agreements that have done more harm than good.

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